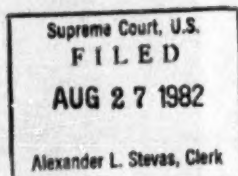
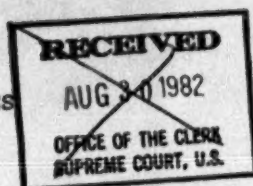


IN THE
SUPREME COURT OF THE UNITED STATES

82-5306

OCTOBER TERM 1981



BOBBY LEWIS SHAW,

Petitioner,

VS.

STATE OF MISSOURI,

Respondent.

Cause No. _____

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

In a murder case where the sentence upon conviction includes the death penalty and where the defendant is a borderline mental retard, do the Eighth and Fourteenth Amendments to the Constitution of the United States and this court's decision in Lockett v. Ohio, 438 U.S. 586 (1978) and in subsequent death cases require a jury instruction that specifically informs the jury that in addition to the consideration given to specifically listed statutory and non-statutory aggravating circumstances that under the law it must also consider the defendant's low mentality as a mitigating factor in reaching a decision on whether to impose the death penalty?

In the present case the jury was not instructed to consider the defendant's low mentality as a mitigating circumstance, and it assessed the death penalty.

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<u>Washington v. Watkins</u> , 655 F2d 1346, 1375 (5th Cir 1981) cert. denied 4/26/82. 50 USLW 3859
Eighth Amendment to the Constitution of the United States
Fourteenth Amendment to the Constitution of the United States
28 USC Section 1257 (3)
3 Lawyers Medical Cyclopedia, 37-39 (1970)

OPINION BELOW

The opinion of the Supreme Court of Missouri has not yet been reported. A copy of the slip opinion appears in Appendix A, infra. The order of the Court overruling Petitioner's Motion for Rehearing and Motion for Stay of Execution is attached as Appendix B.

JURISDICTIONAL STATEMENT

Petitioner was found guilty of the crime of capital murder on October 1, 1980. On November 25, 1980 in accordance with the verdict of the jury, Petitioner was sentenced to death.

The verdict and judgment were appealed to the Supreme Court of Missouri. On August 2, 1982 the Supreme Court of Missouri affirmed Petitioner's conviction and sentence. On August 23, 1982 the Supreme Court of Missouri overruled Petitioner's Motion for Rehearing and Petitioner's Motion for Stay of Execution. Petitioner's execution is scheduled for September 16, 1982.

This Petition for Writ of Certiorari to review the judgment of the Missouri Supreme Court is being filed within sixty (60) days of the decision by that court as required by United States Supreme Court Rule 20.1

Title 28 U.S.C. Section 1257 (3) confers jurisdiction upon this Court to review the judgment below by Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States prohibits the imposition of "cruel and unusual punishment." The Fourteenth Amendment to the Constitution of the United States prohibits the states from depriving "any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

On July 16, 1979 Petitioner, who was an inmate at the Missouri State Penitentiary serving a life sentence for murder, killed Walter Farrow a prison guard. Armed with two butcher knives he assaulted a second guard and attempted to assault two inmates.

The only evidence offered in his defense was the testimony of a state employed psychiatrist, who conducted a psychiatric examination pursuant to a court order, that Petitioner was a borderline mental retard. Petitioner has an I.Q. of 73. ^{1/}An I.Q. between 72 and ~~75~~⁷⁵ is considered borderline mentally retarded. Petitioner's verbal I.Q. of 75 put him in the bottom eight percent of the population and his

1/

"A person's intelligence quotient (I.Q.) is determined as follows: If a ten-year-old child passes all of the tests that are standardized for the ten-year-old child, he has a mental age of ten years and a chronological age of ten years and his I.Q. is 100 per cent. In contrast, if an individual had a mental age of fifteen years when his chronological age was ten years, his I.Q. would be 150 per cent. On the other hand, if he were ten years old physically but had a mental age of only five years, his I.Q. would be 50 percent. For individuals over sixteen, the I.Q. is usually computed as if the chronological age were sixteen, although on some tests the upper age range is considered as fourteen.

On basis of tests of intelligence, psychologists have classified the mentally defective into three major groups: idiots, imbeciles, and morons.

3. Morons.- These are mentally defective individuals with an I.Q. from fifty to seventy or seventy-five. Morons very frequently are involved in minor antisocial behavior, such as truancy from school, petty stealing, etc. A moron may be defined as one who is capable of earning a living under favorable circumstances, but he is incapable, from mental defect existing from birth or early age, of competing on normal terms with normal fellows, or of managing himself and his affairs with ordinary prudence." 3 Lawyers Medical Cyclopedia 37-39 (1970)

On this basis Petitioner has a mental age of 11.68 if sixteen is considered the chronological age or 10.22 if fourteen is considered the chronological age. Petitioner's actual chronological age in 1979 was 28 years.

performance I.Q. of 69 placed him in the bottom two per cent of the population by that measure (TR 414-415).

An instruction on diminished capacity by reason of mental disease or defect was neither requested nor given by the trial court (TR 426).

In his closing argument the prosecutor pointed out the absence of any insanity instruction and stressed that it would be improper for the jury to consider lack of mental responsibility in determining guilt (TR 435-436). He further stated:

...Is he less guilty because he doesn't have the intellect of a lawyer? If his mental deficiency were a legitimate defense, the judge would have given you an instruction on it. It is not (TR 452).

The jury found Petitioner guilty of capital murder.

At the sentencing phase of the trial the State offered evidence of prior criminal convictions as evidence of non-statutory aggravating circumstances. The Petitioner requested an instruction that he acted under extreme duress or the substantial domination of another as a mitigating circumstance. The instruction was refused by the trial court.

The jury was given the following instructions:

INSTRUCTION NO. 17

In determining the punishment to be assessed against the defendant for the murder of Walter Wayne Farrow, you must first unanimously determine:

1. Whether the murder of Walter Wayne Farrow was committed against a corrections employee while engaged in the performance of his official duty. It was the official duty of Walter Wayne Farrow to supervise the inmates in the vegetable room within the Missouri State Penitentiary.

2. Whether at the time of the murder of Walter Wayne Farrow, the defendant was in the lawful custody of a place of confinement.

You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt at least one of the foregoing circumstances, and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists and that it is an aggravating circumstance, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

INSTRUCTION NO. 18

If you find and believe from the evidence beyond a reasonable doubt that one or more of the circumstances submitted in Instruction No. 17 exists and that at least one of them is an aggravating circumstance, it will then become your duty to decide whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as punishment of defendant. In deciding that question you may consider all of the evidence relating to the murder of Walter Wayne Farrow.

You may also consider any of the aggravating circumstances referred to in Instruction No. 17 which you found beyond a reasonable doubt.

You may also consider any of the following circumstances if you find from the evidence beyond a reasonable doubt that it exists and that it is an aggravating circumstance:

1. That the defendant has previously been convicted of the crime of Stealing From A Person;
2. That the defendant has previously been convicted of the crime of Attempted Robbery First Degree;
3. That the defendant has previously been convicted of the crime of Murder First Degree.

If you do not unanimously find from the evidence beyond a reasonable doubt that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

INSTRUCTION NO. 19

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 18, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of Walter Wayne Farrow.

You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment.

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

The jury returned the following verdict:

VERDICT FORM

(Jurors: Use this form only if the punishment fixed by you is death. See Instruction No. 21 for directions as to what must be written into the verdict form if the death penalty is imposed. Use the reverse side of this form if necessary. The foreman's signature must appear at the end of the matter which you designate in writing as the aggravating circumstance or circumstances which all twelve jurors

found beyond a reasonable doubt.)

"We, the jury, having found the defendant guilty of capital murder of Walter W. Farrow, fix the defendant's punishment at death, and we designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt:

1. The murder of Walter Wayne Farrow was committed against a corrections employee while engaged in the performance of his official duty.

2. The defendant was in the lawful custody of a place of confinement at the time of the murder of Walter Wayne Farrow.

3. The defendant has previously been convicted of the crime of Murder First Degree.

Darlyn Thornhill

In his appeal to the Supreme Court of Missouri, Petitioner raised the issue of the failure of the trial court to instruct the jury that Petitioner's low mentality should be considered as a mitigating circumstance (Petitioner's Brief pp 26-27). This issue was raised under Missouri Supreme Court Rule 29.12 (b) which permits the Court to consider plain errors affecting substantial rights where a manifest injustice or miscarriage of justice has resulted. The Court considered the issue in its opinion and held that Petitioner was not entitled to an instruction that his low mentality was a mitigating circumstance (Slip opinion pp 8-9 Judge Seiler's dissent, pp 1-4)

ARGUMENT

In Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976) this court held that a capital sentencing scheme that accorded "no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind" and did not meet the requirements of the Eighth and Fourteenth Amendments. Woodson supra at 304-306. Woodson involved the constitutionality of

a mandatory death sentence statute.

The constitutional requirement of individual consideration of the character and record of the individual offender was addressed by this Court in Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978). The Court declared a sentencing statute, which limited the sentencer's consideration of the appropriateness of the death sentence to specific statutory mitigating circumstances, unconstitutional. The statute in Woodson was declared unconstitutional because it permitted no consideration of relevant mitigating circumstances. The statute in Lockett was declared unconstitutional because it limited the mitigating circumstances that could be considered by the sentencer. It is clear from the holding in Lockett that the sentencer in a capital case must be free to consider any and all mitigating circumstances in reaching a decision to impose the death penalty. Bell v. Ohio, 438 U.S. 637, 57 L.Ed.2d 1010, 98 S.Ct. 2977 (1978), Green v. Georgia, 442 U.S. 95, 60 L.Ed.2d 738, 99 S.Ct. 2150 (1979).

In Eddings v. Oklahoma, 455 U.S. ___, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982) the Court took the additional step of holding that not only must the sentencer be free to consider all mitigating circumstances but that in addition the sentencer must consider all mitigating circumstances. While the sentencer can determine the weight to be given relevant mitigating circumstances it "may not give it no weight by excluding such evidence from their consideration." In Eddings the Court considered the fact that Eddings' mental and emotional ages were at levels several years below his chronological age to be a relevant mitigating circumstance.

The procedure followed by the courts of Missouri fail to meet this constitutional standard in the present case for two reasons. First, the jury instruction on mitigating circumstances is permissive and not mandatory. Instruction 19 which was given by the trial court in this case instructs the jury that it "may also consider any circumstances which you find from the evidence in extenuation or mitigation of

punishment." The use of the permissive "may" instead of the mandatory "must" implies that the jury is free to ignore mitigating circumstances. This is contrary to the holding in Eddings.

Secondly, the failure to give a specific instruction on the Petitioner's low mentality as a mitigating factor is contrary to the holdings in Eddings, Lockett, and Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976).

An instruction that merely invites the jury to search through the record to find mitigating circumstances is not an adequate substitute for an instruction that Petitioner's low mentality is a mitigating circumstance which must be considered under the law.

In considering the imposition of the death sentence by juries this Court has stated that the jury must be given guidance through a proper instruction of the factors that must be considered in imposing the death penalty. Gregg supra, at p. 191-193. The instruction in the present case misstated the law by conveying the notion that the consideration of mitigating circumstances was optional and by even failing to inform the jury that the Petitioner's low mentality was a mitigating factor. The latter was particularly damaging in view of the prosecutor's statement that the absence of an instruction from the court on the issue of mental disease or defect meant that the Petitioner's responsibility due to mental disease or defect was not to be given any consideration. This assertion in the guilt phase of the trial went unanswered and unchallenged in the sentencing phase.

It is apparent from the jury's verdict in this case that it considered the instructions on aggravating circumstances carefully. The jury found two statutory and one non-statutory aggravating circumstances. It is fair to assume that the jury would have given similar consideration to mitigating circumstances if it had been properly instructed on the existence of a mitigating circumstance.

In Washington v. Watkins, 655 F2d 1346, 1375 (5th Cir 1981) cert. denied 4/26/82. 50 USLW 3859. The Court of Appeals for the Fifth Circuit in a habeas corpus proceeding, set aside a death sentence where the instructions given to the jury effectively precluded the consideration of non-statutory mitigating circumstances. In applying the holding of this Court in Lockett, the court stated,

"The fatal flaw in Lockett was not the exclusion of evidence relating to non-statutory mitigating factors, but the limitation of the sentencer's consideration of that evidence except as it related to the statutory mitigating factors.

Only an instruction from the trial court can invest a particular concept - here the jury's ability to consider nonstatutory mitigating factors - with the authority of the court.

In short, under Lockett, the error in the trial court's proscription of jury consideration of nonstatutory mitigating circumstances was one of constitutional proportions that violated rights secured to Washington under the Eighth and Fourteenth Amendments; given that the entire purpose of the sentencing proceedings was to determine and balance aggravating against mitigating circumstances, that error unquestionably so infected the sentencing proceedings as to drain them of fundamental fairness".
Washington, supra at 1375, 1376.

For the reasons stated above the Petitioner's rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States have been abridged. That denial of rights guaranteed by the Constitution of the United States has produced a death sentence which the State of Missouri threatens to execute on September 16, 1982.

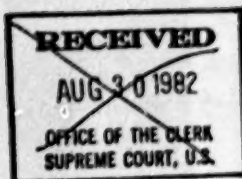
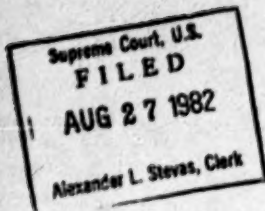
WHEREFORE, Petitioner respectfully requests this Court to issue its Writ of Certiorari to the Supreme Court of the State of Missouri and to review the judgment and decisions of the Courts of Missouri in this case.

Respectfully submitted,

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Telephone: 314/634-4737
Attorney for the Petitioner

82-5306

IN THE
SUPREME COURT OF THE UNITED STATES



OCTOBER TERM 1981

BOBBY LEWIS SHAW,

PETITIONER

VS.

STATE OF MISSOURI,

RESPONDENT.

CAUSE NO. _____

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW, Petitioner, by and through his attorney,
and moves this Court pursuant to 28 U.S.C. Section 1915 and
Rule 46.1 of the Supreme Court for leave to proceed in forma
pauperis for the following reasons:

1. On this date petitioner has filed a petition for writ of certiorari in the above-captioned cause;
2. Petitioner is a prisoner in the Missouri Department of Corrections, has no means of income, and is without funds to pay the costs or fees in this cause;
3. Upon a showing of indigency in the Circuit Court of Cole County, Missouri, the Public Defender was appointed to represent petitioner and has represented him throughout the hearings and appeals in state court;
4. Petitioner was granted leave to file his appeal to the Supreme Court of Missouri in forma pauperis following the judgment and sentence of the trial court;
5. The petition for writ of certiorari in this cause is taken in good faith.

WHEREFORE, for the foregoing reasons, petitioner requests leave to proceed in forma pauperis.

Respectfully submitted,

William M. Barvick
William M. Barvick
Special Assistant Public Defender
124 East High Street
Jefferson City, Missouri
Telephone: 314/634-4737

A F F I D A V I T

STATE OF MISSOURI)
) SS
COUNTY OF COLE)

William M. Barvick, being first duly sworn on his oath, states that he is a Special Assistant to the Public Defender for the Nineteenth Judicial Circuit, State of Missouri, and is licensed to practice law in the State of Missouri and is a Member of the Bar of this Court. Affiant further states that he represents petitioner in this cause and the facts stated in the foregoing Motion for Leave to Proceed in Forma Pauperis are true to the best of his knowledge and belief.

William M. Barvick
William M. Barvick

Subscribed and sworn to before me this 26th day of August 1982.

Mary S. Barvick
Notary Public

My commission expires:

IN THE
SUPREME COURT OF THE UNITED STATES

RECEIVED

AUG 30 1982

OFFICE OF THE CLERK
SUPREME COURT, U.S.

OCTOBER TERM 1981

BOBBY LEWIS SHAW,

Petitioner,

VS.

Cause No. _____

STATE OF MISSOURI,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Bobby Lewis Shaw, being duly sworn, depose and say that I am the Petitioner in the above-entitled cause; that in support of my motion to file a petition for writ of certiorari without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the matters set forth below relating to my ability to pay are true.

1. I am not presently employed. I am an inmate at the Missouri State Penitentiary where I have been confined since July 1979.

2. I do not own any cash, savings accounts, real estate, stocks, bonds, automobiles or similar property.

3. I have been represented by the Public Defender for the Nineteenth Judicial Circuit of the State of Missouri throughout the proceedings in state courts.

4. The petition for writ of certiorari in the above-

captioned case is filed in good faith upon my belief that I am entitled to redress.

I understand that a false statement in the affidavit will subject me to penalties for perjury.

Bobby S. Shaw
Bobby Lewis Shaw

STATE OF MISSOURI)
COUNTY OF COLE) SS

Subscribed and sworn to before me this 27 day of August 1982.

BOBBY D. ROARK
NOTARY PUBLIC STATE OF MISSOURI
COLE COUNTY
My Commission Expires 1-10-86

Bobby D. Roark
Notary Public



Supreme Court of Missouri

en banc

STATE OF MISSOURI,

Respondent,

vs.

BOBBY LEWIS SHAW,

Appellant.

No. 62679

DUPLICATE
OF FILING ON

AUG -2 1982

IN OFFICE OF
CLERK SUPREME COURT

APPEAL FROM THE CIRCUIT COURT OF FRANKLIN COUNTY
Honorable Lawrence O. Davis, Judge

Appellant, an inmate at the Missouri State Penitentiary,¹ was convicted by a jury of capital murder, § 565.001, RSMo 1978,² for the stabbing death of Walter Farrow, a penitentiary corrections officer. The jury recommended the death penalty pursuant to § 565.008(1). This Court has exclusive appellate jurisdiction. Mo. Const. art. V, § 3. We affirm both the conviction and the sentence of death.

I

The facts are not in dispute.

On July 16, 1979, Officer Farrow was assigned to his usual position of supervisor of the twelve to fifteen inmates, including appellant, who worked in the vegetable preparation room at the penitentiary. At approximately 7:20 a.m., pursuant to normal procedure, he checked out two butcher knives and fifteen paring knives from the cold storage area where they were kept overnight. He took them to

¹ Appellant currently is serving a life sentence for first degree murder imposed under the Second Offender Act, § 556.280, RSMo 1969. See *State v. Shaw*, 569 S.W.2d 375 (Mo. App. 1978).

² All statutory references are to RSMo 1978 unless otherwise specified.

the vegetable room, where inmates used them to prepare fresh vegetables for the penitentiary kitchen. The knives were kept in a locked cabinet in the vegetable room and were checked out to inmates individually. At the time of the stabbing Farrow had unlocked the cabinet but had not yet issued knives to any of the inmates.

Inmate Roy Maggard, who was assigned to work in the vegetable room, testified that at about 7:30 a.m. he was drinking coffee and talking with Farrow and inmate Bruce Rogers. Maggard and Rogers were sitting on a sink countertop in the vegetable room eight to ten feet across from the knife cabinet and Farrow's desk. Maggard testified that he did not see or hear appellant approach. He said, however, that when he turned after hearing Farrow make a noise and say, "No, Shaw, no," he saw appellant, who was standing only inches away from the three-foot-high railing surrounding the desk, holding the two butcher knives that Maggard and Rogers usually used to cut cabbage. Maggard saw when Farrow rose from his chair that Farrow had been stabbed. Appellant ran out of the room, and Farrow, who was bleeding profusely, went to the door and ordered appellant to return.

Maggard and Rogers assisted Farrow back to a chair, and Maggard telephoned for assistance from other officers. Maggard then went down the hall approximately twenty-five to thirty feet to the state commissary in an effort to obtain assistance. There he saw inmates assisting Clinton Wyrick, the uncle of the warden and a civilian commissary employee, who also was bleeding from apparent stab wounds. Maggard said, "Oh, my God, no," and he returned to the vegetable room. Other officers arrived, and Farrow was taken to the penitentiary hospital, where he died because of blood loss about an hour after the stabbing. The stab wound was approximately seven inches deep. It penetrated the chest wall, went between the ribs, pierced the diaphragm and right lobe of the liver, and ended at the bottom of the liver. It severed the hepatic artery, which supplies blood to the liver, and as a result approximately three-quarters of Farrow's blood drained into the body cavity.

Inmate Byron Berry testified that earlier in the morning, as he was walking back to his job in the main kitchen after applying for a job on the loading dock behind the vegetable room, he saw appellant and another inmate standing alone outside one of the buildings. As he passed within two or three feet of them, he overheard the other inmate ask appellant, "When are you going to do that?" Appellant replied, "I'm going--might as well do it, now." Berry said that there was "something mentioned of a ring, a payment." He also said that he heard one of the men mention the name "Clint" and that he knew of only one person named Clint--Clinton Wyrick--inside the penitentiary.

Clinton Wyrick testified over appellant's objection that he was at his desk in the commissary that morning when appellant entered the open commissary doors. Appellant came around the low railing enclosing Wyrick's desk "in a kind of a little jog trot," took one step at the corner of Wyrick's desk, and, without saying a word, began to stab Wyrick with a butcher knife that he held in his left hand. He also tried to stab Wyrick with a butcher knife in his right hand. The stabbing actions were directed toward Wyrick's chest, but Wyrick was able to fend off the attack with his right arm, which was severely injured in the process. All the arteries and ligaments in his right arm were cut, and once the knife went completely through Wyrick's right arm. In addition, Wyrick was stabbed once in the chest, twice in the stomach, and once in the left arm. The attack lasted thirty to forty-five seconds before appellant ran out of the commissary.

Lt. James Wyrick, Clinton Wyrick's son and the warden's cousin, testified that he had just left the main dining room when he heard on his walkie talkie that there had been a stabbing in the commissary. He ran outside to "seal off the area." At that point he did not know whom appellant had stabbed. As he was attempting to lock Gate Nine, he saw appellant walking toward him. Appellant ordered Lt. Wyrick to let him by, and when Lt. Wyrick refused to do so, appellant pulled

two butcher knives from the waistband of his pants and said, "I said, get out of the way." Lt. Wyrick backed away, and appellant went through the gate. Appellant ran through another gate, across the lower prison yard, and into an upper area of the yard before appellant finally obeyed orders to stop. He dropped the knives and was taken into custody.

Appellant's evidence consisted solely of the testimony of Dr. Sadishur Parwatikar, a psychiatrist. Dr. Parwatikar testified that appellant has an I.Q. of 73, within the range of borderline mental retardation. He testified that persons of a low I.Q. are generally more susceptible to the suggestions of others than are persons with a higher I.Q. He testified on cross-examination by the state that suggestibility does "not necessarily" interfere with the mental process and that he did not believe that appellant "could not make up his mind." He also testified on cross-examination that appellant would be able to form the intention to kill another person, that he would be able to know that he was practically certain to cause the death of another, and that he would be able to consider taking the life of another person and to reflect thereon coolly and carefully before doing so.

II

During voir dire the trial court recessed between questioning by the prosecutor and the defense counsel. The court admonished the veniremen not to discuss the case or receive outside input, but it did not read MAI-CR2d 1.08(a). Later, after the questioning by both sides was completed but before the jury was selected and sworn, the court allowed the veniremen to separate during a recess for lunch. Appellant now contends that the word "jurors" as used in § 546.230 and surrounding sections, specifically §§ 546.180 and 546.200-.220, actually means "veniremen" and that the trial court therefore erred (1) by failing to read MAI-CR2d 1.08(a) at the first recess and (2) by allowing the veniremen to separate for lunch.

Section 546.230 provides:

With the consent of the prosecuting attorney and the defendant, the court may permit the jury to separate at any adjournment or recess of the court during the trial in all cases of felony, except in capital cases; and in misdemeanors the court may permit such separation of the jury on its own motion, but when the jurors are permitted to separate, after being impaneled as provided for in this chapter, and at each adjournment the court must admonish them that it is their duty not to converse among themselves, nor to suffer others to converse with them or in their hearing on any subject connected with the trial, or to form or express any opinion thereon, until the cause is finally submitted to them.

(Emphasis added.)

The trial court did not err by failing to read MAI-CR2d 1.08(a) to the venire panel at the first recess. That instruction is included within the section entitled "Oral Instructions to the Jury" and follows MAI-CR2d 1.06, "Instructions After Jury Is Sworn." The jury does not exist until the veniremen selected therefor are sworn to service in that capacity. See Black's Law Dictionary 768-69 (5th ed. 1979). It therefore is unnecessary to read MAI-CR2d 1.08(a) to the venire panel. See State v. Bryant, 558 S.W.2d 269, 269-70 (Mo. App. 1977). Moreover, it is clear that the trial court complied with the dictates of the statute.³ The trial court adequately admonished the veniremen,⁴ and there was no objection as to the sufficiency of the

³ At least one court of appeals case has held that the admonishment provision of § 546.230 applies to only the jury and not the venire panel. State v. Underwood, 530 S.W.2d 261, 264-65 (Mo. App. 1975). We are not required to make that determination in order to resolve this case.

⁴ The trial court instructed the jury as follows:
Let me also admonish you, ladies and gentlemen, you know very little about the case at this time, but you do have some general knowledge about it which has been related by [the prosecutor]. Of course, that is not evidence, it's merely to assist you in answering his questions intelligently. I don't want you to discuss the case even among yourselves at any time when the court is not in session. Certainly don't discuss it with anyone else, don't let anyone talk to you about the case. If anyone should try to do that, simply remind them that you are a potential juror and I've told you not to discuss the case at all.

court's instruction. See State v. Brown, 502 S.W.2d 295, 299 (Mo. 1973). Substantial compliance with the statute is all that is required. State v. Harris, 477 S.W.2d 42, 46 (Mo. 1972).

Neither was it error for the trial court to allow the veniremen to separate during the lunch recess. Section 546.230 proscribes only the separation of the jury, which at that point did not yet exist. State v. Williams, 515 S.W.2d 463, 466-67 (Mo. 1974).⁵

III

Appellant next contends that the trial court erred in admitting evidence of the subsequent attack upon Clinton Wyrick. He argues that its admission was unconstitutionally inflammatory and that evidence of a crime committed after, rather than before, the crime with which a defendant is charged is not competent proof.

A criminal defendant has the right to be tried only for the crime or crimes with which he is charged. State v. Wright, 582 S.W.2d 275, 277 (Mo. banc 1979); State v. Holbert, 416 S.W.2d 129, 132 (Mo. 1967). The admission of evidence of offenses unrelated to the cause on trial breaches that right because it may result in a conviction founded upon crimes of which the defendant is not accused. Thus, the long-established general rule is that proof of the commission of separate and distinct crimes is inadmissible unless it has some legitimate tendency to establish that the defendant is guilty of the crime with which he is charged. State v. Lasley, 583 S.W.2d 511, 517 (Mo. banc 1979); State v. Carter, 475 S.W.2d 85, 88-89 (Mo. 1972);

⁵ Williams held that the proscription against separation of the jury in capital cases did not become effective until the jury had been sworn. 515 S.W.2d at 467. Appellant argues that we should overrule Williams because at the time it was decided in 1974 Missouri's capital punishment law was unconstitutional. It is unnecessary to do so, however, because nothing in Furman v. Georgia, 408 U.S. 238 (1972), abrogates the holding in Williams. Furman struck down death penalty provisions that, because of the jury's unfocused sentencing discretion, created a substantial risk that the punishment would be inflicted in an arbitrary and capricious manner.

State v. Shilkett, 356 Mo. 1081, 1086, 204 S.W.2d 920, 922-23 (1947); State v. Harrold, 38 Mo. 496, 497-98 (1866). Specifically, such evidence is admissible to prove the crime charged when it tends to establish motive, intent, the absence of mistake or accident, a common scheme or plan embracing the commission of two or more crimes so related that proof of one tends to establish the other, or the identity of the person charged with the commission of the crime on trial. State v. Reese, 364 Mo. 1221, 1226, 274 S.W.2d 304, 307 (banc 1954).

The evidence of the assault upon Wyrick was admissible both to show motive and to prove the state's theory that the attacks upon Farrow and Wyrick were a part of a common scheme or plan intended to culminate in the injury or murder of Wyrick, the warden's uncle. In this case Wyrick's testimony about the attack was followed immediately by inmate Berry's testimony concerning the conversation he overheard between appellant and another inmate. The jury reasonably could have believed that appellant thought it necessary to eliminate Farrow in order to consummate his planned attack upon Wyrick and that the latter was his motive for so doing.

Appellant contends that the admission of evidence of the assault upon Wyrick was unconstitutional because it "was highly prejudicial and it was designed to inflame the passions of the jury" against him. He points to the language in Beck v. Alabama, 447 U.S. 625, 638 (1980), that the determination of guilt, as well as the imposition of sentence, in a capital case must be made "on the basis of 'reason rather than caprice or emotion.'" While that statement as a fundamental matter of due process is but a truism, it would be foreign to our concept of criminal jurisprudence to suggest that relevant evidence should be inadmissible merely because it tends to prejudice the defendant. See State v. Wood, 596 S.W.2d 394, 403 (Mo. banc), cert. denied, 449 U.S. 876 (1980). Any incriminating evidence is by

definition prejudicial. Relevance is the touchstone of due process, and beyond that the decision whether potentially prejudicial or inflammatory evidence should be admitted lies within the sound discretion of the trial court, id., which is in a better position to balance the probative value and danger of the evidence. We cannot say that the trial court abused that discretion.

Appellant argues that evidence of a crime committed after, rather than before, the crime with which a defendant is charged is not competent proof. This Court, however, upheld admission of subsequent crimes tending to prove a common scheme or plan in *State v. Gillespie*, 336 S.W.2d 677 (Mo. 1960), noting that "[t]he law need not be so technical or blinded to reality as to ignore a major part of such an infamous scheme." Id. at 683. See *State v. Hindman*, 543 S.W.2d 278 (Mo. App. 1976). See also *People v. Houston*, 219 Cal. App. 2d 187, 33 Cal. Rptr. 26 (1963). The cases appellant cites in support of his argument, *State v. Wood*, 613 S.W.2d 898 (Mo. App. 1981); *State v. Howard*, 601 S.W.2d 308 (Mo. App. 1980); *State v. Buford*, 582 S.W.2d 298 (Mo. App. 1979), are inapposite because in none of those cases, which involved the improper joinder of charges, was there evidence of a common scheme or plan. *State v. Wood*, 613 S.W.2d at 902; *State v. Howard*, 601 S.W.2d at 309; *State v. Buford*, 582 S.W.2d at 302. Evidence of the attack upon Clinton Wyrick was both competent and relevant. There was no error in admitting the testimony

IV

Appellant argues that the trial court erred in failing to instruct the jury on diminished mental capacity during the guilt phase of the trial because, he claims, the testimony of Dr. Parwatikar that appellant has an I.Q. of 73 and thus is borderline mentally retarded constitutes evidence that appellant had diminished mental capacity at the time of the offense. He also argues that diminished mental capacity should

have been submitted to the jury during the sentencing phase as a mitigating circumstance.

Under the doctrine of diminished mental capacity, unlike under the doctrine of not guilty by reason of a mental disease or defect excluding responsibility, a defendant remains fully responsible for his conduct but can be found guilty of only those offenses, if any, of which he is mentally capable. *State v. Anderson*, 515 S.W.2d 534 (Mo. banc 1974). Diminished mental capacity is a special negative defense. MAI-CR2d 3.47 n.6. A special negative defense is one

(1) upon which defendant does not carry the burden of proof . . . , (2) supported by enough evidence arising during the whole case to raise a reasonable doubt of defendant's guilt, and (3) presenting a positive fact or set of circumstances, as distinguished from a bare denial or converse, which, if found would negate one or more essential elements of an offense . . . or which, if found, would constitute a legal defense.

MAI-CR2d 2.04 n.2.

The evidence in this case would not support an instruction on diminished mental capacity. Dr. Parvatikar's uncontradicted testimony upon cross-examination by the prosecutor established that appellant would be able to form the intention to kill another person, that he would be able to know that he was practically certain to cause the death of another, and that he would be able to consider taking the life of another person and to reflect thereon coolly and carefully before doing so. Those elements are prerequisites to the ability to commit capital murder. See MAI-CR2d 15.02. The trial court did not err in not instructing on diminished mental capacity during either the guilt or sentencing phase of the trial.

V

Appellant contends, finally, that certain statements made by the prosecutor during his closing argument in the sentencing phase of the trial require that the death penalty be vacated.

During his lengthy argument the prosecutor made the following statements:

[Prisoners are in the penitentiary] because they could not be allowed to live in the society that you and I live in. Their conduct being so bad, in this case a thief, then a robber, and a murderer, that he could not--normal society could not tolerate his existence and they had to remove him. Where do we have? Where is the only place that is available to remove him to? The society of the Missouri State Penitentiary. The maximum security correctional facility in the State of Missouri. And now he's back in society. Now, it's a different society, be no doubt about that. But he's here. He's here to try to make his way. And now what's happened? He can't make it in this society. He's murdered again. Now, this is not an inmate who was murdered by another inmate, this is not a vicious person, this is an innocent sixty-one-year-old man who just out of the clear, blue sky, doing nothing but just passing his morning time after fifteen years or so in the Division of Corrections, who is murdered. This defendant can't be allowed to live in this society any longer. He can't make it in ours, we already knew that, you know it, now. Now, he can't make it in this society.

. . . [Y]ou can reasonably bet that every inmate in [the penitentiary] has--knows just where the gas chamber is. What does it mean to the inmates? What did it mean to Bobby Shaw as he ran from the scene of a murder, down a ramp as indicated on this photograph, right past where the gas chamber was located? I mean, he didn't hesitate. Is there any indication that that meant anything to him? I mean, this was a planned out murder. Did this have any indication of a consideration? Well, I submit to you, you make your own judgment, but it didn't mean a thing to him, then. And, unless you sentence him to death, it won't mean a thing to him, now. . . .

. . . I submit to you, and [the defense counsel] may well say to you, you've got to live with this for years. You can't save Walter Farrow, you can't bring him back to life. But you might save another corrections officer or deputy sheriff or police officer if you take a stand and you say, "There is a line and it's time for that line to be drawn." A man murders once, it's a life sentence. He murders again, he's had his life sentence. Bobby Shaw deserves to be sentenced to death. He has earned that right.

Appellant contends first that the prosecutor misstated the law. State v. Bolder, ____ S.W.2d ____ (Mo. banc 1982) (No. 62362, decided July 6), was the first case in which we reviewed a death sentence

⁶ The italicized sentences are the ones of which appellant complains on appeal. We quote the prosecutor's comments at length in order to demonstrate the context in which those statements were made.

imposed by a jury after it found as a statutory aggravating circumstance that the defendant was lawfully confined at the time of the murder. In Bolder, as in the present case, the appellant was serving a life sentence for first degree murder at the time he committed another murder within the confines of the Missouri State Penitentiary. We said in Bolder that "[t]he life sentence that appellant is already serving for first degree murder did not deter appellant from committing still another murder. The imposition of yet another life sentence would serve no purpose other than to signal that there is no real cost for prisoners who kill while in confinement." Id. at _____. We noted that "the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future" was one purpose underlying § 565.012(2)(9), which provides as a statutory aggravating circumstance that "[t]he capital murder was committed by a person in . . . the lawful custody of a . . . place of lawful confinement." State v. Bolder, _____ S.W.2d at _____. We concluded that the legislature, in adopting that statutory aggravating circumstance,

reasonably could have concluded that the death penalty is appropriate when imprisonment already imposed does not deter capital murder. The imposition of capital punishment is rationally related to the state's obviously legitimate interests in preventing crime and protecting other persons, such as prison employees and other inmates, with whom prisoners come in contact.

Id. at _____ (emphasis added). The prosecutor in this case did not misstate the law.

Appellant's second argument is that the prosecutor misled the jury "into believing that a life sentence actually means life without the possibility of parole" and that because prisoners under a life sentence generally will be paroled, the imposition of another life sentence, this time without possibility of parole for fifty years, would be an effective deterrent. A majority of the Court in Bolder rejected precisely the same argument posed by Judge Seiler in dissent.

See id. at ____ (Seiler, J., dissenting). We noted that the United States Supreme Court "has suggested that an intentional killing by a prisoner serving a life sentence or convicted of an unrelated murder presents a unique problem that may justify mandatory imposition of the death penalty." Id. at ____ n.16. See Roberts v. Louisiana, 428 U.S. 325, 334 n.9 (1976); Gregg v. Georgia, 428 U.S. 153, 186 (1976). See also Lockett v. Ohio, 438 U.S. 586, 604 n.11 (1978); Roberts v. Louisiana, 431 U.S. 633, 637 n.5 (1977); Woodson v. North Carolina, 428 U.S. 280, 287 n.7, 292-93 n.25 (1976). The Supreme Court appended no qualification that the previous conviction be for capital murder or that the sentence already imposed require that the defendant serve a minimum amount of time, such as the fifty years required by Missouri's capital scheme, before he could be considered for parole. We think it unnecessary to impose such a qualification here.

Appellant next asserts that the prosecutor should be prevented from arguing that the jury should impose the death penalty on the basis of any aggravating circumstance--in this case, appellant's previous conviction for first degree murder--that is not specifically enumerated in § 565.012(2). This argument misconceives the rationale underlying the use of statutory aggravating circumstances. The jury does not impose the death sentence on the basis of the aggravating circumstance or circumstances that it finds in a particular case. Rather, "[t]he jury's finding that one or more statutory aggravating circumstances exist is the threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence." State v. Bolder, ____ S.W.2d at ____ (emphasis added). See Gregg v. Georgia, 428 U.S. at 197. The use of statutory aggravating circumstances helps prevent the arbitrary and capricious imposition of death sentences that the Supreme Court condemned in Furman v. Georgia, 408 U.S. 238 (1972), because the jury's sentencing discretion "is guided and channeled by a system that focuses on the

circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed." Proffitt v. Florida, 428 U.S. 242, 258 (1976). The jury thus cannot "reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime[.]" Gregg v. Georgia, 428 U.S. at 197. The statute clearly contemplates that the jury in deciding whether to impose the death penalty shall consider, in addition to the statutory aggravating circumstance or circumstances that it finds, "any . . . aggravating circumstance otherwise authorized by law." § 565.012(1)(2). The imposition of punishment should rest upon a consideration of the evidence as a whole. It would be inconsistent with both the language and the purpose of the statute to impose upon the state the limitation that appellant now urges.

Finally, appellant contends that the prosecutor's argument was intended to arouse the passions of the jury against him. The trial court has broad discretion in controlling the arguments of counsel, State v. Lansford, 594 S.W.2d 617, 622 (Mo. banc 1980), and absent an abuse of that discretion there is no reversible error, State v. Wood, 596 S.W.2d at 403. Appellant did not object to the prosecutor's argument at trial, and we cannot say that the trial court abused its discretion by not intervening on its own motion.

VI

Section 565.014(1) mandates that we review the death sentence when it is imposed. Having found no error among appellant's assignments of error, we turn to a consideration of the punishment.

Section 565.014(3) provides:

With regard to the sentence, the supreme court shall determine:

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
- (2) Whether the evidence supports the jury's

or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and
(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Our review of the entire record convinces us that the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

The jury found two aggravating circumstances present in this case. It found that the murder was committed against a corrections employee engaged in the performance of his official duty, § 565.012(2)(8), and that it was committed by a person in the lawful custody of a place of lawful confinement, § 565.012(2)(9). There is no dispute in this case as to the correctness of the jury's findings. They are supported by the evidence.

Our final consideration is whether the death penalty, taking into account both the crime and the defendant, is excessive or disproportionate to the penalty imposed in similar cases. Since the enactment of our current capital murder statute, § 565.001, this Court has reviewed and affirmed three death sentences. *State v. Bolder*, ___ S.W.2d ___ (Mo. banc 1982); *State v. Newlon*, 627 S.W.2d 606 (Mo. banc 1982), petition for cert. filed, ___ U.S.L.W. ___ (U.S. May 5, 1982) (No. 81-6660); *State v. Mercer*, 618 S.W.2d 1 (Mo. banc), cert. denied, 102 S. Ct. 432 (1981). We have reversed one death sentence because of its disproportionality. *State v. McIlvoy*, 629 S.W.2d 333 (Mo. banc 1982). In addition to *Bolder*, *Newlon*, and *Mercer*, we have affirmed twelve capital cases in which the choice of death or life imprisonment without possibility of parole for fifty years was submitted to the jury. *State v. Greathouse*, 627 S.W.2d 592 (Mo. 1982); *State v. Bostic*, 625 S.W.2d 128 (Mo. 1981); *State v. Thomas*, 625 S.W.2d 115 (Mo. 1981); *State v. Emerson*, 623 S.W.2d 252 (Mo. 1981); *State v. Turner*, 623 S.W.2d 4 (Mo. banc 1981), cert. denied, 102 S. Ct. 1982 (1982); *State v. Jensen*, 621 S.W.2d 263 (Mo. 1981); *State v. Baskerville*, 616 S.W.2d 839 (Mo. 1981); *State v.*

Mitchell, 611 S.W.2d 223 (Mo. banc 1981); State v. Williams, 611 S.W.2d 26 (Mo. banc 1981); State v. Royal, 610 S.W.2d 946 (Mo. banc 1981); State v. Borden, 605 S.W.2d 88 (Mo. banc 1980); State v. Downs, 593 S.W.2d 535 (Mo. 1980).

We have decided only one case in which the statutory aggravating circumstance was that the murder was committed by a person in the lawful custody of a place of lawful confinement. We upheld the conviction and death sentence recently in State v. Bolder, which is strikingly similar to the present case. In Bolder, as here, appellant at the time of the killing was imprisoned in the Missouri State Penitentiary on a conviction for first degree murder. Bolder stabbed and killed another inmate. One pending case, State v. Trimble, No. 62523 (Mo. banc argued Sept. 15, 1981), involved the same aggravating circumstance, and in that case the jury imposed the death penalty.⁷

This is the first case we have reviewed in which the jury found as an aggravating circumstance that the murder was committed against a corrections employee engaged in the performance of his official duty. The addition of this circumstance, we believe, makes the imposition of the death penalty even more compelling in this case. The murder of on-the-job corrections employees cannot, and must not, be taken lightly if the stability of the penal system is to be maintained.⁸

⁷ We consider this case only to determine what penalties juries have imposed in factually similar situations. See State v. Bolder, S.W.2d at _____. In so doing we intimate no view as to its ultimate disposition.

⁸ We note that the jury imposed the death penalty in one of three analogous cases in which the aggravating circumstance was that the murder was of a police officer in the performance of his official duties. State v. Baker, No. 63244 (Mo. banc argued May 17, 1982). See note 7 *supra*. In the two other such cases the jury imposed life imprisonment without the possibility of parole for fifty years, but in both there was evidence of mental disease or defect at the time of the murder, and there was evidence in both that the murder was committed while the defendant was under extreme mental or emotional disturbance. State v. Thomas, 625 S.W.2d 115 (Mo. 1981); State v. Davis, No. 63475 (Mo. banc filed Oct. 16, 1981). Such is not the case here.

This case is not, as appellant argues, similar to State v. McIlvoy, in which the death penalty was reversed because of its disproportionality. McIlvoy was peculiar because McIlvoy received the death penalty although his accomplice, who was the driving force behind the plot, did not. Moreover, a host of other factors, considered as a whole, demonstrated the inappropriateness of capital punishment. The circumstances surrounding this case fall far short of exhibiting the same quality of mitigation. McIlvoy, as each case must be, was decided on its own facts, and it should not be given the broad reading urged by appellant.

Those imprisoned for violating our laws have cast upon the state both the expense of, and the responsibility for, their safe care while in confinement. We have always held the state to the highest standards in the exercise of that responsibility. Those for whom the state must bear responsibility should be held to an equally high standard of conduct. We are unaware of either sound reason or social policy for excusing the senseless killing of either fellow prisoners or corrections officers.

We conclude that the death penalty imposed in this case is neither excessive nor disproportionate to the punishment imposed in similar cases.⁹

The judgment is affirmed.

WARREN D. WELLIVER, Judge

Donnelly, C.J., Rendlen, Morgan, Higgins, JJ., concur; Seiler, J. dissents in separate dissenting opinion filed; Bardgett, J., dissents and concurs in dissenting opinion of Seiler, J.

Date of execution set for September 16, 1982.

⁹ The "viciousness" and "extremes" of this case have previously been recognized. See State v. Bolder, ____ S.W.2d at ____ (Seiler, J., dissenting).



Supreme Court of Missouri

en banc

STATE OF MISSOURI,

Respondent,

vs.

BOBBY LEWIS SHAW,

Appellant.

DUPLICATE
OF FILING ON

No. 62674
AUG -2 1982

IN OFFICE OF
CLERK SUPREME COURT

DISSENTING OPINION

I respectfully dissent. In my opinion the trial court erred in not instructing on diminished mental capacity, both during the guilt and sentencing phase of the trial.

Sections 552.030.3(1) and (2), RSMo Supp. 1981, provide as follows:

3. Evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible

(1) To prove that the defendant did or did not have a state of mind which is an element of the offense; or

(2) For the purpose of determining whether or not the defendant, if found guilty of a capital offense, shall be sentenced to death or life imprisonment.

There was evidence in this case from a qualified medical expert that the defendant has an I.Q. of 73, that anything between 72 and 85 is considered to be borderline mentally retarded;¹ that his verbal I.Q. was around 75 which would put him in the lower 8th percentile of the population; that his performance I.Q. was 69 which would put him

1. The American Association on Mental Deficiency defines mental retardation as follows: Mental retardation refers to subaverage intellectual functioning which originates during the development period and is associated with impairment in adaptive behavior. R. Edgerton, *The Cloak of Competence* 3 (1967).

in the bottom 2% of the general population; that a person with a lower I.Q. is more susceptible to suggestion and temptation and that this particular defendant should be considered borderline mentally defective.

The principal opinion points out there was also evidence in this case that nonetheless it would be possible for defendant to form the intent to kill another person, to know that he was practically certain to cause the death, and to consider doing so and reflect thereon coolly and carefully. It does not follow, however, that defendant's mental defect did not, in this particular case, operate so that he did not reflect coolly and carefully before doing what he did. There is evidence in the case that defendant and another inmate were talking just a few moments before defendant went into action and that the other inmate asked defendant, "When are you going to do that?", to which defendant replied "Might as well do it now" and that there also was something said about a ring and a payment, following which defendant virtually ran amuck.

It is not only a question of whether there is sufficient evidence to support a submission of capital murder. It is also a question of whether there was evidence sufficient for the jury to find that defendant's mental capacity or lack of it was such that he did not, in fact, on this occasion, coolly and deliberately reflect and consider upon the matter, both with respect to the acts performed or as bearing upon whether he should have the death penalty. *State v. Anderson*, 515 S.W.2d 534 (Mo. banc 1974). Being a borderline mental defective goes to the existence of the state of mind which makes up the elements of capital murder, and inasmuch as capital murder is the only crime for which death can be the punishment, it also goes to whether this particular defendant deserves the death penalty. "[I]t is essential that the capital-sentencing decision allow for consideration of

whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." *Roberts v. Louisiana*, 431 U.S. 633, 637 (1977).

The report required of the trial judge by § 565.014.1, RSMo 1978, on the questionnaire prepared by this court has a space to "List any non-statutory mitigating circumstances indicated by the evidence, if any" to which the trial judge answered "low mentality." Why was it not, therefore, instructed upon?

The Missouri death penalty statute requires a high degree of specificity as to aggravating circumstances instructions, so that the jury's attention is channeled in that direction. No such specificity is required, however, as to non-statutory mitigating circumstances. The only mention in the instructions in this regard was the general statement contained in instruction No. 19 to the effect the jury could consider all the evidence relating to the murder and "any circumstances which you find from the evidence in extenuation or mitigation of punishment." This is vague. The jury should be allowed to examine this particular individual with at least the same degree of specificity as to extenuating or mitigating circumstances as it does with respect to aggravating circumstances.

It was for the jury to decide whether defendant's mental defect raised a reasonable doubt as to whether or not he acted with required mental intent. The jury should have considered this both at the guilt phase and at the punishment phase, but in the absence of MAI-CR 2d 3.74 being given in the guilt phase and the absence of any mention of mental defect in the sentencing stage in the instructions, the jury's attention was deflected elsewhere. The practical effect was to minimize the jury's consideration of relevant mitigating factors, contrary to the requirements of *Lockett v. Ohio*, 438 U.S. 586 (1978).

A person who is a borderline mental defective is by definition a person of limited intelligence. The principal opinion distinguishes this defendant from the defendant in *State v. McIlvoy*, 629 S.W.2d 333 (Mo. banc 1982), where the death penalty was reduced to a life sentence without parole for 50 years. There, too, the defendant, among other things, was of "limited intelligence" (I.Q. of 81), "a weakling and follower." *Id.* at 341.² Similar considerations are present here. A person with an I.Q. of 73 is not on the same level with a person of normal intelligence. The matter of defendant's admitted subnormal intelligence should have been a factor which the jury was called upon to consider, just as a young age is something which the jury would be called upon to consider, even though a sixteen year old youth (if that were the defendant's age) would be capable of forming the necessary intent for capital murder. Defendant's mental capabilities should be taken into consideration for the jury to resolve one way or the other as to its effect on guilt or punishment, but that was not done here.

Robert E. Seiler, Judge

2. Considering the crime, see § 565.014.3(3), other facts for comparison of *McIlvoy* with this case as to disproportionateness of the death penalty are that *McIlvoy* and others first tried to ambush the victim on the evening of February 2, 1979, but could not get close enough, so a second effort was made the following night. This time the victim's truck was stopped. According to the trial judge's report in the *McIlvoy* case (see § 565.014, *supra*), *McIlvoy* approached within a few feet of the victim and shot him twice in the head at point blank range. The gun jammed. *McIlvoy* unjammed it and put two more shots into the victim's head. The gun again jammed. *McIlvoy* again unjammed it and got off two more shots. The victim was hit in the head five times. For this *McIlvoy* was to have been paid \$1,000 by the victim's wife.

A P P E N D I X B



CLERK OF THE SUPREME COURT

STATE OF MISSOURI

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August 23, 1962

THOMAS F. SIMON
CLERK

TELEPHONE
(314) 751-0100

Mr. William M. Barvick
124 E. High Street
Jefferson City, MO 65101

Re: State of Missouri vs. Bobby Lewis Shaw
No. 62679

Dear Mr. Barvick:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled.
Appellant's motion for stay of execution
overruled."

Very truly yours,

A handwritten signature in dark ink, appearing to read "Thomas F. Simon".
Clerk

cc: Attorney General

RECEIVED

SEP 20 1982

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

BOBBY LEWIS SHAW,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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Question Presented

1. Whether the Missouri form criminal instructions, which provide in capital cases that if non-statutory mitigating circumstances are supported by the evidence the jury is instructed that it may consider "any circumstances which you find from the evidence in extenuation or mitigation of punishment," violates petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution on the basis that the non-statutory mitigating circumstances are not specifically set out in the instruction.

2. Whether petitioner may raise a constitutional claim in this Court which was never presented to the Supreme Court of Missouri or to any other state court.

TABLE OF AUTHORITIES

Cases Cited

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<u>Gregg v. Georgia</u> , 428 U.S. 153 (1976)	8
<u>Lockett v. Ohio</u> , 438 U.S. 586 (1978)	8, 9, 11
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Constitutional Provisions and Statutes Cited

Eighth Amendment, U.S. Constitution	1, 8
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§ 565.001, RSMo 1978	2
§ 552.030.3, RSMo 1978	3
MAI-CR2d 15.44	1, 5, 8
Missouri Supreme Court Rule 28.02(e)	5

CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the constitutional provisions cited by petitioner in his petition, the following other authorities are relevant to the issues presented herein.

1. Section 565.012.3, RSMo 1978, states as follows:

"Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime."

2. Missouri Approved Instructions-Criminal, Second Edition (hereinafter abbreviated "MAI-CR2d") 15.44 and the accompanying Notes on Use are attached to this response as Appendix A.

STATEMENT OF THE CASE

Petitioner Bobby Lewis Shaw was convicted of capital murder, § 565.001, RSMo 1978, and was sentenced to death for the fatal stabbing of a correctional officer while petitioner was an inmate at the Missouri State Penitentiary. Since the evidence of petitioner's guilt is fully set out in the opinion of the Missouri Supreme Court affirming his conviction and sentence, State v. Shaw, No. 62679 (Mo. banc., August 2, 1982) (petitioner's Appendix A), that evidence will not be stated here except as relevant to petitioner's constitutional claim.

The evidence bearing upon petitioner's present contention is as follows: the sole witness called by the defense at the guilt stage of trial was Dr. Sadishur Parwatikar, a psychiatrist for the Missouri Department of Mental Health who had conducted a psychiatric evaluation of petitioner (trial transcript--hereinafter "Tr."--at 411-413). The defense theory underlying the introduction of Dr. Parwatikar's testimony was that of "diminished mental capacity": that as a result of a "mental disease or defect" petitioner was incapable of forming the necessary intent (principally, premeditation and deliberation) to commit the crime of capital murder. See § 552.030.3, RSMo 1978. Dr. Parwatikar testified that petitioner had a tested I.Q. of approximately 73, within the borderline of mental retardation, and that persons with a low I.Q. are generally more susceptible to suggestion than persons with higher intelligence test scores (Tr. 413-415). However as to the effect of petitioner's intelligence level upon his ability to commit capital murder, Dr. Parwatikar testified without dispute or contradiction as follows:

"Q. Doctor, with the I.Q. that you stated the defendant had, would he be able to form the intention to kill another person?

A. Yes, sir, he could.

Q. Would he be able to know that he was practically certain to cause the death of another person if he stabbed them with a knife?

A. Yes, sir.

Q. Would he be able with his I.Q. to consider carefully and coolly, cold-bloodedly, upon taking the life of another person?

A. Yes, sir.

* * *

Q. (By Mr. Brown) Dr. Parwatikar, I want to repeat the last question again. Would the defendant with his I.Q. be capable of considering taking the life of another human being and reflecting upon that matter coolly, cold-bloodedly, before doing so?

A. Yes, sir, he can." (Tr. II 421-423).

At the close of the guilt phase of trial, petitioner did not request and the trial court did not submit to the jury an instruction on "diminished capacity" (Tr. 426-428); when petitioner claimed after his conviction that such an instruction should have been given, the Missouri Supreme Court cited the above-quoted testimony of Dr. Parwatikar in concluding that a diminished-capacity instruction was not supported by the evidence. State v. Shaw, supra, slip opinion at 8-9. Petitioner does not challenge this conclusion in the petition at bar.

Following petitioner's conviction of capital murder, the bifurcated hearing on punishment was held; at this hearing, the only additional evidence adduced by either party was the introduction by the state of certified copies of petitioner's prior convictions for murder, attempted

robbery and stealing (Tr. 474-475) and testimony that petitioner was in the custody of the Missouri State Penitentiary at the time of the present murder (Tr. 476-478). At the close of this evidence, the jury was instructed as to its duties and responsibilities in the punishment phase (Circuit Court's legal file--hereinafter "L.F."--at 24-30). The statutory aggravating circumstances submitted by the state were that the murder "was committed against a corrections employee while engaged in the performance of his official duty," § 565.012.2(8), RSMo 1978; and that "at the time of the murder of [the victim], the defendant was in lawful custody of a place of confinement," § 565.012.2(9) (L.F. 25). None of the statutory mitigating circumstances listed in § 565.012.3 were supported by the evidence.¹ The principal jury instruction on mitigating evidence was Instruction No. 19, which stated as follows:

"If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 18, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of Walter Wayne Farrow.

You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment.

¹Petitioner did seek a submission under § 565.012.3(5) that "the defendant acted under extreme duress or substantial domination of another person" (L.F. 33); however, as the trial court correctly noted (Tr. 471), this theory was utterly unsupported by evidence on the record. Petitioner does not complain of the court's ruling in his present petition.

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence." (L.F. 27).

This instruction is in the form of MAI-CR2d (Missouri Approved Instructions-Criminal, Second Edition) 15.44 which is attached to this response as Appendix A. The MAI-CR2d instructions forms are promulgated by the Supreme Court of Missouri, and are required to be used to the exclusion of all other instructions. Missouri Supreme Court Rule 28.02(c). Under MAI-CR2d 15.44, statutory mitigating circumstances must be specifically listed when they are supported by the evidence and, if any non-statutory mitigating circumstances are supported by the evidence the following language is inserted: "You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment." MAI-CR2d 15.44, Notes on Use at note 5 (Appendix A). This language is contained in Instruction No. 19, above (L.F. 27). Petitioner did not request that any non-statutory mitigating circumstances be specifically listed in this instruction.

After the submission of instructions, the closing arguments as to punishment were made by the state and defense (Tr. 479-495). In his argument, the defense counsel made specific reference to petitioner's low intelligence score in arguing that the death penalty should not be imposed:

"A man -- you heard [Dr. Parwatikar], Dr. Sam we call him, the absolute bottom of the barrel, the lowest eight percent of the population in mentality, cosened into this senseless murder plot

by some superior inmate over the offer of a -- supposed offer of a ring. A man so devoid of the simplest things of life that something of that nature could convince him that he should accomplish something by that. It's incredible that you would now be asked to do what he is accused of, kill. And you alone can take the responsibility, no one else" (Tr. 495).

Thereafter, the jury returned a sentence of death (L.F. 19). On appeal to the Missouri Supreme Court, petitioner's counsel asserted for the first time that petitioner's low intelligence should have been specifically listed as a non-statutory mitigating circumstance in Instruction No. 19. This theory was rejected by the Missouri Supreme Court, State v. Shaw, supra, slip opinion at 8-9, and petitioner now advances the same contention in the petition at bar.

Summary of Argument

Petitioner principally argues that the instructions submitted to the jury at the punishment phase of trial with regard to mitigating circumstances violated his constitutional rights because they did not specifically refer to his particular theory of mitigation; the instruction on mitigating evidence advised the jury that "[y]ou may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment." The decisions of this Court require that the defendant be free to submit to the sentencing authority any evidence or theory which might serve to mitigate his crime. The challenged instruction does not in any manner infringe upon that right. Petitioner was not prevented or limited in any way in introducing mitigating evidence, he was permitted to (and did in fact) argue his theory of mitigation to the jury during the punishment phase, and the jury was explicitly instructed that it was permitted to consider this or any other mitigating factor which it found from the evidence.

Petitioner's remaining contention, that the instruction on mitigating circumstances was incorrect in stating that the jury "may" consider mitigating evidence, is advanced for the very first time in this certiorari petition, having not been raised in any Missouri court, and thus is not reviewable in this Court. In any event, the decisions of this Court do not stand for the proposition that the sentencing authority is required to consider any and all "mitigating" evidence that defendants may introduce, but only that the sentencer may not be precluded as a matter of law from considering such evidence if it so desires. The instructions in the present case did not limit in any manner the jury's right to consider any and all mitigating evidence.

Argument

Petitioner's principal theory in his certiorari petition is that the sentence of death imposed upon him constitutes "cruel and unusual punishment" under the Eighth and Fourteenth Amendments to the United States Constitution because his low intelligence scores were not specifically listed as a mitigating circumstance in Instruction No. 19 submitted to the jury (L.F. 27). Under MAI-CR2d 15.44, promulgated by the Missouri Supreme Court (see Appendix A), the mitigating circumstances listed in § 565.012.3, RSMo 1978, are set out in the instruction if supported by the evidence, and if any non-statutory mitigating circumstances are shown by the evidence, the instruction additionally states that "[y]ou may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment." That language is contained in Instruction No. 19.

It is beyond dispute that capital sentencing schemes must, in order to pass constitutional muster, permit "the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976); see Gregg v. Georgia, 428 U.S. 153, 189 (1976). As to the jury's consideration of mitigating evidence, this Court's holding is clear:

"[W]e conclude that the Eighth and Fourteenth Amendments require that the sentences...not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (emphasis in original). Eddings v. Oklahoma, 455 U.S. ___, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978).

Neither the holdings of these decisions nor their underlying policy was violated in the present case. Petitioner was not restricted in any way in introducing mitigating evidence at the punishment stage of trial. Nor was the jury limited, implicitly or explicitly, as to what mitigating evidence it was permitted to consider--to the contrary, it was told that it could "consider any circumstances which you find from the evidence in extenuation of mitigation of punishment" (emphasis supplied; L.F. 27). It is absurd for petitioner to argue that the absence of a specific reference to his mitigation theory in the instruction somehow prevented the jury from properly considering it; not only did petitioner have the right to introduce evidence on his theory, but he was entitled to (and did in fact) argue it in detail to the jury.²

In short, nothing whatsoever in the challenged instruction infringes upon the right of the defendant, protected by Eddings, Lockett and related cases, to place any and all mitigating theories before the sentencing authority. Eddings v. Oklahoma, supra, 102 S.Ct. at 874-875.

The absence of merit in petitioner's current theory is apparent in a comparison of the case at bar with Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied ___ U.S. ___, 102 S.Ct. 2021 (1982), cited by petitioner. In Washington, the jury was given instructions at the punishment stage which stated (or strongly implied) that they could consider only the mitigating circumstances specifically enumerated in the instruction. Id., 655 F.2d at 1367-1368. In holding that this instruction constructively violated Lockett v. Ohio, supra, the Court of Appeals pointed out that

² Petitioner's reference to a portion of the state's closing argument as signifying to the jury that it could not consider petitioner's intelligence scores in deciding on punishment (petition at 5, 9), is frivolous and pretextual; the argument in question was made during the guilt stage of trial (see Tr. 452), and the prosecution neither stated nor implied that this or any other factor was beyond the jury's province in deciding on punishment.

"nowhere in the trial court's charge to the jury in the sentencing phase of Washington's trial is there any explicit instructions that the jury was free to consider mitigating factors other than [those listed in the instruction]" (emphasis in original). Washington v. Watkins, supra, 655 P.2d at 1369.

In the present case, by contrast, the jury was specifically so advised; petitioner's complaint is simply that the instruction did not go into all of the detail that he would prefer. Absent the slightest reasonable argument that the instruction at issue somehow prevented the jury from considering the contention that petitioner's low intelligence mitigated his act of cold-blooded murder (or any other theory of mitigation that petitioner desired to raise), no legitimate basis exists for the issuance of a writ of certiorari in this case.

In addition to the above claim, petitioner advances an alternative theory: that Instruction No. 19 is defective because it advises the jury that it "may" consider any mitigating circumstances it finds from the evidence, and that this violates Eddings v. Oklahoma, supra, because it permits them to "ignore mitigating circumstances" (petition at 8-9). The principal difficulty with this claim is that it was never presented to any state trial or appellate court, but rather is raised for the very first time in this certiorari petition.³ As this Court has noted:

³ Although this could be demonstrated by production of the state court records and briefs, it is also manifest from the fact that the present theory was not addressed in the opinion of the Missouri Supreme Court. Where "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary" (citations omitted). Street v. New York, 394 U.S. 576, 582 (1969).

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgement of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system" (citations omitted). Webb v. Webb, 451 U.S. 493, 496-497 (1981).

See also Sandstrom v. Montana, 442 U.S. 510, 527 (1979).

Since neither the Supreme Court of Missouri nor any other state court has had the opportunity to pass upon petitioner's current theory, that theory is not properly reviewable here.

In any event, petitioner's theory is without merit. Eddings v. Oklahoma, *supra*, stands for the simple proposition that the sentencing authority cannot be restricted as to what mitigating factors it may be permitted to consider in imposing punishment; in Eddings, the sentencing judge made statements which this Court interpreted as signifying that he believed that he could not, as a matter of law, consider the defendant's violent and disturbed childhood in imposing punishment. *Id.*, 102 S.Ct. at 873-875. However, this decision does not signify, as petitioner claims, that the sentencing "must consider all mitigating circumstances" (emphasis in original; petition at 8). Under Eddings and Lockett v. Ohio, *supra*, the defendant has a virtually unrestricted right to introduce any evidence which he thinks might somehow serve to mitigate his crime; if the defendant desired to adduce testimony as to his favorite color or his hat size, he apparently has a constitutional right to do so. Nothing in any decision of this Court, however, requires the sentences to give weight to such evidence; the Constitution simply "requires the sentencer to listen." Eddings v. Oklahoma, *supra*, 102 S.Ct. at 876 (n.10). Since instruction No. 19 does not in any manner restrict what the jury may consider in rendering its decision as to punishment, it is frivolous for petitioner to allege a constitutional violation here.

CONCLUSION

In view of the foregoing, the respondent respectfully submits that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

MAI-CR2d 15.44, and the Notes on Use accompanying that instruction form, provide as follows:

15.44 Guilty of Capital Murder: Submission of Mitigating Circumstances -

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. _____, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of [name of victim].

(You may also consider [here insert and, if more than one, list and number in separate paragraphs any one or more of the following "statutory mitigating circumstances" which are supported by evidence. Omit this entire paragraph if there are no such circumstances to submit.]

1. Whether the defendant has no significant history of prior criminal activity.
2. Whether the murder of [name of victim] was committed while the defendant was under the influence of extreme mental or emotional disturbance.
3. Whether [name of victim] was a participant in the defendant's conduct or consented to the act.
4. Whether the defendant was an accomplice in the murder of [name of victim] and whether his participation was relatively minor.
5. Whether the defendant acted under extreme duress or substantial domination of another person.
6. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

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7. The age of the defendant at the time of the offense.)

(You may also consider [See Note 4])

(You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment. [See Note 5])

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

Notes on Use

1. This instruction will be read to the Jury immediately after MAI-CR 15.42.

2. The blank in the first paragraph will be filled in with the number given MAI-CR 15.42.

3. The second paragraph must be given, whether requested or not, if there is evidence supporting any "statutory" mitigating circumstance. See Sections 565.012.1 (2) and 565.012.3.

4. The third paragraph must be given, whether requested or not, if there is evidence supporting a mitigating circumstance or circumstances "authorized by law". See Section 565.012.1 (3). If more than one such circumstance is submitted, each one should be numbered, begin with the word "That", and set off in a separate paragraph not connected with an "and" or an "or".

Omit all of the third paragraph if there are no such circumstances to submit.

The phrase "authorized by law" does not limit extenuating or mitigating circumstances to those specifically directed to death penalty issues. Section 556.006.2 provides, in part, that "the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of punishment, including the record of any prior

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criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas".

Note also that RSMo 1969, Section 552.030.3(2) provides that "evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible . . . for the purpose of determining whether or not the defendant, if found guilty of a capital offense, shall be sentenced to death or life imprisonment." Therefore, in directing the jury to consider extenuating or mitigating circumstances "otherwise authorized by law", the court should permit the jury to consider any evidence that the defendant suffered from a "mental disease or defect" as that phrase is defined in Section 552.010, RSMo 1969, and in MAI-CR 2.32. In such case one of the mitigating circumstances might be: "That the defendant had a mental disease or defect at the time of the murder of [name of victim]". The court must then follow that with the MAI-CR 2.32 definition of "mental disease or defect" even if that definition was also given at the first stage of the trial.

5. The jury may consider extenuating or mitigating circumstances even though not set out as "statutory" mitigating circumstances in Section 565.012.3 and even though not "authorized by law" within the meaning of that phrase discussed in 4 above. However, no instruction should be given calling the jury's attention to any particular circumstance referred to in general in this paragraph.